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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/901,979	07/10/2001	Lutz Heuer	Bayer 8890.4-KGB	8954

7590 11/12/2003

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EXAMINER

PRYOR, ALTON NATHANIEL

ART UNIT	PAPER NUMBER
1616	18

DATE MAILED: 11/12/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/901,979	HEUER ET AL.
Examiner	Art Unit	
Alton N. Pryor	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 05 September 2003.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 7-15 is/are pending in the application.

4a) Of the above claim(s) 8,13 and 14 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 7,9-11 and 15 is/are rejected.

7) Claim(s) 12 is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. §§ 119 and 120

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

13) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

a) The translation of the foreign language provisional application has been received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

#### Attachment(s)

1) Notice of References Cited (PTO-892)                    4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                    5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ .                    6) Other: \_\_\_\_\_ .

## DETAILED ACTION

### *Response to Amendment*

- I. Rejection of claims 7,9,15 under 35 USC 102(b) and claims 10 and 11 under 35 USC 103(a) as being obvious over Hubele on record will not be maintained. Applicant provides the English translation of Foreign Priority Document.
- II. Rejection of claims 7,9,15 under 35 USC 102(b) as being anticipated by Schaub on record will be maintained for reasons on record and reasons as follows.

Applicant argues that the Schaub reference is not sufficiently focused enough to constitute anticipation. Applicant argues that Schaub teaches a composition comprising (A) any of a large number of azole compounds which one is cyproconazole plus (B) optionally a large number of compounds of which one is benomyl. Applicant argues that Schaub does not teach a specific combination comprising benomyl plus cyproconazole. Applicant argues that Schaub teaches more than 432 possible compositions of which only one combination is cyproconazole plus benomyl. Examiner disagrees with Applicant's arguments. Examiner takes the view that Schaub does anticipate the instant combination of cyproconazole plus another azole (benomyl). Examiner argues that Schaub anticipates the instant combination, because Applicant employs a broad claim in that the second component of Applicant's claim is to an azole compound – such a claim would result in more than 432 possible combinations. Therefore, in this instant case, it is appropriate to use broad art to reject a broad claim under 35 USC 102(b).

III. Claim Rejection under 35 USC 103(a)

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schaub as applied to claims 7,9,15 above in further view of Valcke et al (EP 393746; 10/24/90). See 35 USC 102(b) in paper number 15. Schaub teaches all that is recited in claims 10 and 11 except for the composition comprising propiconazole. However, Valcke teaches a fungicide composition comprising propiconazole. Valcke teaches that the composition is used to control fungi on wood. See abstract. It would have been obvious to one having ordinary skill in the art to modify the composition of Schaub to include propiconazole. One would have been motivated to do this in order to make a composition that would have been more effective in controlling fungi on wood.

IV. Objection to claim 12 is maintained for reasons on record.

***Telephonic Inquiry***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton N. Pryor whose telephone number is 703 308-4691. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman Page can be reached on 703-308-2927. The fax phone number for the organization where this application or proceeding is assigned is 703 305-3592.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703 308-1235.

  
Alton N. Pryor  
Primary Examiner  
AU 1616

ALTON N. PRYOR  
PRIMARY EXAMINER